NO. SC92062

IN THE MISSOURI SUPREME COURT

PAT DUJAKOVICH, *et al.*,
APPELLANTS

vs.

ROBIN CARNAHAN, *et al.*,
RESPONDENTS.

Appeal from the Circuit Court of Cole County, Missouri
Honorable Jon Edward Beetem, Div. 1

APPELLANTS' BRIEF

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PAT DUJAKOVICH AND TROY SCHULTE

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JURISDICTIONAL STATEMENT

Appellants Pat Dujakovich and Troy Schulte are appealing the trial court's judgment dismissing their Second Amended Petition. This action involves the question of whether amendments to the state earnings tax statutes, RSMo Sections 92.105 through 92.125, which require the City of Kansas City to hold periodic elections in order to continue its earnings tax, violate the Missouri Constitution in three distinct ways.

First, Appellants assert the amendments, which were proposed by an initiative petition and adopted by the voters of Missouri in November 2010, violate Article III, Section 51 of the Constitution by using the initiative for the appropriation of money, in that the elections to continue the earnings tax will require Kansas City to appropriate funds to pay for the election costs. Second, Appellants argue the requirement to hold the recurring elections without providing state funds for the cost of such elections constitutes an unfunded mandate in violation of the Hancock Amendment. Finally, Appellants maintain the amendments violate Article VI, Section 20 of the Missouri Constitution by using the statewide initiative process to amend a City Charter. The Kansas City Charter (2006), continuing the authority granted by the municipal electorate in 1963, authorizes the City to levy an earnings tax by ordinance, without requiring renewal elections. For the reasons stated above, this action involves the validity of a statute, a matter which falls within the exclusive appellate jurisdiction of the Missouri Supreme Court pursuant to Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

The Kansas City Earnings Tax

In 1963 the Missouri General Assembly enacted the enabling legislation which authorized Kansas City to levy and collect by ordinance an earnings tax for general revenue purposes. L. 1963 p. 152 §1, L.F. 87. The enabling legislation was codified as RSMo Sections 92.210 through 92.300. L.F. 87. RSMo Section 92.300 of the enabling law specified that no ordinance for an earnings tax would be effective unless the voters of the city approved an amendment to the city charter authorizing the legislative body of the city to impose the tax. L.F. 88. Kansas City's voters passed such a charter amendment in 1963 authorizing the levy and collection of an earnings tax at a rate of one-half percent per year. L.F. 88. The City Council then passed an ordinance in 1963 levying a one-half percent earnings tax. L.F. 88.

The General Assembly increased the earnings tax rate limit in the enabling law, RSMo Section 92.230, to one percent in 1969. A.L. 1969 p. 165. The voters of Kansas City then approved a charter amendment in 1970 that authorized an increase in the earnings tax rate to one percent. §394.1 Charter of the City of Kansas City, Missouri (1925), L.F. 88. On August 8, 2006 the voters of Kansas City adopted a new city charter in which they continued and reaffirmed the authority to levy and collect an earning tax of one percent per year. Art. VIII, §813, Charter of the City of Kansas City, Missouri (2006), L.F. 88. The current ordinances levying a one percent earnings tax are at Section 68-381 through 68-403 of the Code of Ordinances of the City of Kansas City, Missouri.

The Initiative

In 2009, a proposed initiative petition was submitted to Secretary of State Robin Carnahan which was referred to as "Statutory Amendment to Chapter 92, Relating to Earnings Taxes 2010-077, Version 3." L.F. 88. Initiative Petition 2010-077 Version 3 proposed to repeal the following sections of existing Chapter 92: Sections 92.110, 92.112, 92.210, 92.220, 92.230, 92.240, 92.250, 92.260, 92.270, 92.280, 92.290 and 92.300. In lieu of those proposed sections, Initiative Petition 2010–077 Version 3 proposed to enact five new sections to be numbered as follows: Sections 92.105, 92.110, 92.112, 92.115, and 92.125. L.F. 88. The full text of Initiative Petition 2010-077 Version 3 is included in the Appendix to Appellants' Brief.

On December 28, 2009, Carnahan, in her official capacity as Missouri's Secretary of State, certified the ballot title to be used if Initiative Petition 2010–077 Version 3 were placed before the voters throughout the State of Missouri. L.F. 89. That certified ballot title stated, in its entirety, the following:

Shall Missouri law be amended to:

- repeal the authority of certain cities to use earnings taxes to fund their budgets;
- require voters in cities that currently have an earnings tax to approve continuation of such tax at the next general municipal election and at an election held every 5 years thereafter;
- require any current earnings tax that is not approved by the voters to be phased out over a period of 10 years; and
- prohibit any city from adding a new earnings tax to fund their budget?

The proposal could eliminate certain city earnings taxes. For 2010, Kansas City and the City of St. Louis budgeted earnings tax revenue of $199.2 million and $141.2 million, respectively. Reduced earnings tax deductions could increase state revenues by $4.8 million. The total cost or savings to state and local governmental entities is unknown. L.F. 89.

After this certification of the ballot title, Initiative Petition 2010–077 Version 3 was circulated for signatures of Missouri registered voters by the Intervenor, Let Voters Decide. L.F. 89. After the gathering of signatures, the signed petitions were submitted to Secretary Carnahan for her to determine whether the submitted petitions contained a number of valid signatures sufficient to comply with the initiative provisions set out in the Missouri Constitution and Chapter 116, RSMo. L.F. 89. On August 3, 2010, Carnahan, in her official capacity as Missouri's Secretary of State, issued her certification that sufficient signatures had been gathered for Initiative Petition 2010–077 Version 3 and that it would appear statewide on the November 2, 2010 ballot as "Proposition A." L.F. 89. Proposition A was approved and adopted by a majority of the votes cast in the statewide general election held November 2, 2010. L.F. 92.

The Parties

Appellant Dujakovich is Missouri taxpayer and a Field Battalion Chief with the Fire Department of the City of Kansas City, Missouri. Appellant Schulte is a Missouri taxpayer and was the Acting City Manager for the City of Kansas City, Missouri at the time this action was

filed. He is now the City Manager. Both Dujakovich and Schulte are Kansas City residents. L.F. 85-86.

Respondent Carnahan is the Missouri Secretary of State. When this action was filed Carnahan was named as the sole Defendant, in her official capacity as Missouri Secretary of State. L.F. 11. After the adoption of the initiative the State of Missouri was joined as an additional Defendant by leave of court in the Second Amended Petition. L.F. 83-84.

Respondents Let Voters Decide, Travis Brown and Scott Charton were the Intervenors in the action before the trial court. Let Voters Decide is a Missouri not-for-profit corporation and registered political action committee which supported the earnings tax initiative petition. Brown and Charton are Missouri taxpayers and voters. Mr. Brown, the president of Let Voters Decide, is a resident of the City of St. Louis. Mr. Charton is a resident of Boone County. L.F. 33.

Procedural Background

Appellants Dujakovich and Schulte filed this action August 13, 2010 in the Circuit Court of Cole County as a legal challenge to Initiative Petition 2010-077 Version 3 on the city earnings tax, naming the Secretary of State as the defendant pursuant to RSMo Section 116.200. L.F. 11-32. Appellants filed their First Amended Petition for Declaratory Judgment and Injunctive Relief on August 25, 2010. L.F. 40-56. On August 27, 2010 the Court granted the motion to intervene by initiative supporters Brown, Charton and Let Voters Decide. L.F. 2.

On September 17, 2010 Judge Beetem held an evidentiary hearing limited to the claims he considered were ripe and which could be ruled on before the outcome of the

November 2010 statewide election on the initiative. Following this evidentiary hearing, the trial court entered judgment on September 20, 2010 in favor of Secretary Carnahan and Intervenors on Count I of the first amended petition and on what the judgment described as the procedural claim contained in Count IV. The judgment stated that the substantive constitutional claims in Count IV were not ripe for adjudication. The Court retained jurisdiction over Counts II and III and the substantive constitutional claims in Count IV, should a ruling be necessary after the statewide election on the initiative petition. L.F. 81-82. This appeal does not concern the trial court's judgment of September 20, 2010.

The initiative question, appearing on the ballot as "Proposition A," passed by a majority vote in the statewide election held November 2, 2010. L.F. 90. Following the election the parties conducted discovery and the suit continued as to the claims not adjudicated in the September 20, 2010 judgment. L.F. 4-5. On April 8, 2011 Judge Beetem granted the Appellants' motion to join the State of Missouri as an additional defendant and for leave of court to file a second amended petition which included the State of Missouri. L.F. 83-84.

Intervenors then filed a motion to dismiss the second amended petition for failure to state a claim. L.F. 116-155. Secretary Carnahan and the State of Missouri filed a separate motion to dismiss the second amended petition on similar grounds. L.F. 179-89. Judge Beetem granted the motions, dismissing all counts of the second amended petition with prejudice in a judgment dated August 15, 2011. L.F. 215-16.

Dujakovich and Schulte filed their timely notice of appeal on September 22, 2011. L.F. 205-18.

Consequences of the Initiative

During Kansas City's fiscal year ending April 30, 2010 Kansas City collected approximately two hundred million dollars from the earnings tax. Kansas City uses its earnings tax revenue to provide a variety of municipal services, including part of the funding for law enforcement, fire suppression and ambulance services. L.F. 91.

In order to retain the earnings tax after the adoption of Proposition A, Kansa City was required to submit to its voters at the next general municipal election date following the adoption of the initiative the question of whether the voters wanted to continue to levy the tax. If a simple majority of the Kansas City electorate voted in favor of continuing to levy the earnings tax at that first renewal election in 2011, the initiative would require similar renewal elections each five years in order to keep the tax in force. If the result in any one of these renewal elections was a majority vote against continued levy of the earnings tax, Kansas City's earnings tax would be phased out over a period of years with the tax rate declining by one-tenth each year until it reached zero in the tenth year. L.F. 90, RSMo §92.115.1.

The cost for a single issue election to renew the Kansas City earnings tax would be $200,000 or more. This cost would be incurred each fifth year, unless and until Kansas City voters voted against continuation of the tax in one of the renewal elections. L.F. 90-91.

Proposition A did not include any provision for a new tax, fee or other revenue source to cover the 2011 Kansas City earnings tax renewal election or any of the earnings tax renewal elections for 2016 and future years. L.F. 90. Consequently, if the Proposition A amendments to the earnings tax law remain in effect, Kansas City will have to bear the costs and appropriate its own funds for all earnings tax renewal elections called for under Proposition A. L.F. 91.

POINTS RELIED ON

Point I

The trial court erred in dismissing Count II of the Second Amended Petition for failure to state a claim because Appellants stated facts demonstrating a justiciable controversy entitling them to a declaratory judgment and the trial court exceeded the standard of review by ruling on the merits of Count II, in that the trial court's determination that Proposition A did not constitute an appropriation by initiative where, by the court's reasoning, Kansas City could avoid election expenditures by simply choosing not to have an earnings tax, was a ruling on the merits.

MO. CONST. art. III, §51 (1945).

City of Creve Coeur v. Creve Coeur Fire Protec. Dist., 355 S.W.2d 857 (Mo. 1962).

Sandy v. Schriro, 39 S.W.3d 853 (Mo. App. W.D. 2001).

Kansas City v. McGee, 364 Mo. 896, 269 S.W.2d 662 (1954).

Point II

The trial court erred in dismissing Count II of the Second Amended Petition because, like the particular ground the trial court ruled on, each of the alternative grounds for dismissal advanced by the Respondents would not have sustained the dismissal, in that Respondents' ground that the prohibition on appropriations by initiative in Mo. Const. art. III, §51 (1945) did not apply to a statewide initiative requiring a local appropriation went to the merits of the claim for declaratory judgment, as did the Respondents' ground that the initiative did not violate the No Appropriations Clause in so far as the costs of the earnings tax renewal elections could be paid for out of the earnings tax that the initiative purportedly authorized.

MO. CONST. art. III, §51 (1945).

City of Creve Coeur v. Creve Coeur Fire Protect. Dist., 355 S.W.2d 857 (Mo. 1962).

Committee for a Healthy Future v. Carnahan, 201 S.W.3d 503 (Mo. 2006).

Point III

The trial court erred in dismissing Count III of Appellants' Second Amended Petition for failure to state a claim because Appellants stated facts entitling them to a declaration of rights and the trial court exceeded its standard of review in reaching the merits of Appellants' claim in that Appellants alleged that the earnings tax initiative violated the Hancock Amendment of the Missouri Constitution as an unfunded mandate because it required a new activity of the City – elections every five years – but failed to provide state financing to fund the elections; and the trial court, by determining that the City could simply choose not to have an earnings tax,

reached the merits of the Appellants' argument, implicitly acknowledging that Appellants had stated a claim for declaratory relief.

MO. CONST. art. X, § 16.

MO. CONST. art. X, § 21.

§ 92.105 RSMo.

§ 92.110.1 RSMo.

City of Creve Coeur v. Creve Coeur Fire Protec. Dist., 355 S.W.2d. 857, 859 (Mo. 1962).

Missouri Municipal League v. State of Missouri, 932 S.W.2d 400 (Mo. 1996).

State of Missouri ex rel. American Eagle Waste Industries v. St. Louis County, 272 S.W.3d 336, 340 (Mo. App. E.D. 2008).

Point IV

The trial court erred in dismissing Count III of Appellants' Second Amended Petition for failure to state a claim because Respondents' argument that "the power of taxation" is not an activity or service under the Hancock Amendment would not have sustained a dismissal in that Appellants argued that the new activity required by Proposition A was the periodic elections required to continue the earnings tax and not the tax itself; and the argument that there is no violation of the Hancock Amendment because the earnings tax does not fall within the definition of "any activity or service" requires an interpretation of the Missouri Constitution and a judgment on the merits.

MO. CONST. art. X, § 16.

MO. CONST. art. X, § 21.

City of Creve Coeur v. Creve Coeur Fire Protec. Dist., 355 S.W.2d. 857, 859 (Mo. 1962).

Loving v. City of St. Joseph, 753 S.W.2d 49, 51 (Mo. App. W.D. 1988)

State of Missouri ex rel. American Eagle Waste Industries v. St. Louis County, 272 S.W.3d 336, 340 (Mo. App. E.D. 2008).

Point V

The trial court erred in dismissing Count III of Appellants' Second Amended Petition for failure to state a claim because Respondents' argument that the Hancock Amendment does not apply to legislation enacted through the initiative would not have sustained a dismissal in that the argument requires an interpretation of the Missouri Constitution and a judgment on the merits; and the plain language of Section 16 of the Hancock Amendment applies to legislation enacted through the initiative process.

MO. CONST. art. X, § 16.

MO. CONST. art. X, § 21.

Baum v. City of St. Louis, 123 S.W.2d 48, 50 (Mo. 1938).

Christensen v. Am. Food & Vending Servs., 191 S.W.3d 88, 92 (Mo. Ct. App. 2006).

City of Creve Coeur v. Creve Coeur Fire Protec. Dist., 355 S.W.2d. 857, 859 (Mo. 1962).

State of Missouri ex rel. American Eagle Waste Industries v. St. Louis County, 272 S.W.3d 336, 340 (Mo. App. E.D. 2008).

Point VI

The trial court erred in dismissing Count III of Appellants' Second Amended Petition for failure to state a claim because Respondents' argument that the elections required by Proposition A are not a new activity would not warrant a dismissal in that Appellants alleged in their petition and the plain language of Proposition A shows that the requirement to hold an election every five years in order to continue the earnings tax is a new requirement that did not exist prior to the passage of Proposition A.

MO. CONST. art. X, § 16.

MO. CONST. art. X, § 21.

§ 92.115.1 RSMo.

§115.121 RSMo.

§115.123 RSMo.

City Charter § 604.

McNabb v. Board of Education of City of St. Louis, 1990 Mo. App. LEXIS 1426 *4 -*7 (Mo. App. 1990).

Point VII

The trial court erred in dismissing Count IV of Appellants' Second Amended Petition for failure to state a claim because Appellants stated facts entitling them to a declaration of rights and the trial court exceeded its standard of review in reaching the merits of Appellants' claim in that Appellants alleged that Proposition A used a statewide initiative to amend the City Charter of Kansas City in violation

of Article VI, Section 20 of the Missouri Constitution, which sets forth the process for amending a City Charter through a local initiative; and the trial court, by determining that the citizens of the state have the authority through the initiative to amend a City's Charter reached the merits of Appellants' argument, implicitly acknowledging that Appellants had stated a claim for declaratory relief.

MO. CONST. art. VI, § 20.

City Charter § 813.

City of Creve Coeur v. Creve Coeur Fire Protec. Dist., 355 S.W.2d. 857, 859 (Mo. 1962).

McConnell v. City of Kansas City, 282 S.W.2d 518, 520 (Mo. 1955).

State of Missouri ex rel. American Eagle Waste Industries v. St. Louis County, 272 S.W.3d 336, 340 (Mo. App. E.D. 2008).

State ex Inf. Taylor, Attorney General, ex rel. Kansas City v. North Kansas City, 360 Mo. 374, 392 (Mo. 1950).

ARGUMENT

Point I

The trial court erred in dismissing Count II of the Second Amended Petition for failure to state a claim because Appellants stated facts demonstrating a justiciable controversy entitling them to a declaratory judgment and the trial court exceeded the standard of review by ruling on the merits of Count II, in that the trial court's determination that Proposition A did not constitute an appropriation by initiative

where, by the court's reasoning, Kansas City could avoid election expenditures by simply choosing not to have an earnings tax, was a ruling on the merits.

Standard of Review

Appellate court review of a trial court's grant of a motion to dismiss is *de novo.* The appellate court is to consider only the grounds raised in the motion to dismiss in determining whether the trial court was correct in dismissing the petition. *City of Lake Saint Louis v. City of O'Fallon,* 324 S.W.3d 756, 759 (Mo. banc 2010).

"A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. The plaintiff's allegations are taken as true, and no attempt is made to weigh any facts alleged as to whether they are credible or persuasive. The petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action or of a cause that might be adopted in that case." *Keveney v. Missouri Military Academy,* 304 S.W.3d 98,101 (Mo. banc 2010).

"[I]t is not the function of the trial court on a motion to dismiss or of this court on an appeal from a judgment of dismissal to make an analysis of the law under which the rights are claimed or to construe the statutes in question or to determine on the merits whether plaintiff is entitled to the declaratory relief he seeks in accordance with the theory he states." *City of Creve Coeur v. Creve Coeur Fire Protec. Dist.*, 355 S.W.2d 857, 859-60 (Mo. 1962).

Argument

In considering a motion to dismiss a petition for declaratory judgment, the trial court is not to rule on the merits. *City of Creve Coeur, Id.* at 859. The only question for

the trial court, and for this Court, is whether the Second Amended Petition pleaded facts which entitled Dujakovich and Schulte to a declaratory judgment. "To sufficiently state a claim for declaratory judgment, the petition need only allege facts that invoke substantive legal principles which entitle the petitioner to relief." *State of Missouri ex rel. American Eagle Waste Industries v. St. Louis County,* 272 S.W.3d 336, 340 (Mo. App. E.D. 2008). If the Second Amended Petition contained facts, not mere conclusions, supporting its allegations, and those facts demonstrated a justiciable controversy, then this Court must reverse the trial court's dismissal and remand the case to the trial court for a determination of the parties' rights. *Sandy v. Schriro,* 39 S.W.3d 853, 855 (Mo. App. W.D. 2001).

Count II of the Second Amended Petition alleged facts which demonstrated a justiciable controversy as to whether Proposition A violated the No Appropriations Clause of Mo. Const. art. III, §51 (1945) by requiring local elections to continue the earnings tax without providing a new revenue source for the election costs, thus forcing Kansas City to make appropriations to pay for such costs. The Second Amended Petition contained the following allegations in that regard: [1]

> 25. Proposition A was approved and adopted by a majority of the votes cast in the statewide general election held November 2, 2010. L.F. 90.

[1] Numbered paragraphs 25-33 are from the General Allegations section of the Second Amended Petition incorporated by Reference into Count II. Numbered paragraphs 35-38 are from Count II.

26. Because Kansas City currently lawfully levies and collects a one per cent per year earnings and net profits tax, the amendments to RSMo Chapter 92 as adopted in Proposition A will have the following impacts on Kansas City:

a. Require Kansas City to put before its voters at the "next general municipal election date" the question of whether they want to "continue to impose or levy the earnings tax."

b. If a simple majority of Kansas City voters at that election vote in favor of continuing "to impose or levy the earning tax"; then, nevertheless, Kansas City must put the same question before its voters every five years even if Kansas City's voters continue to vote in favor of the continuation of the tax time after time.

c. If a simple majority of Kansas City voters at the initial election, or any subsequent 5 years election, vote against continuing "to impose or levy the earning tax"; then Kansas City's earnings and net profits tax will be phased out over ten years at a rate of one-tenth per year. L.F. 90.

27. In 2011 dollars, an election at which Kansas City voters would have only before them the above question would cost Kansas City at least $200,000.00. This cost would be incurred each and every fifth year thereafter, assuming Kansas City voters continue to approve the continuation of this tax. L.F. 90-91.

28. Even if the above question of continuing the Kansas City earnings tax were voted on in an election having candidates for office or other questions on the ballot, Kansas City would incur additional election costs in the form of higher publication costs. L.F. 91.

29. No provision in the text of Initiative Petition 2010–077 Version 3 asked the voters at the November 2, 2010 election to impose a new tax, fee or other revenue source statewide to pay these election costs that Kansas City will repeatedly incur. L.F. 91.

30. During Kansas City's last fiscal year, which began May 1, 2009 and ended April 30, 2010, Kansas City's gross collections from its earnings and net profits tax was approximately $203,332,474.00. L.F. 91.

31. The Plaintiffs have a legally protectable interest in continuing the earnings tax without the burden of the recurring election costs imposed upon Kansas City and its taxpayers by Proposition A. Kansas City uses the revenues it receives from its earnings and net profits tax to fund essential services for its citizens; including part of the funding for law enforcement, fire suppression and ambulance services. Both the added periodic election costs and any resulting loss of earning and net profits tax revenues will result in either reduced services for Kansas City residents and those who work in, or visit, Kansas City or increased real and personal property or other taxes or both. L.F. 91.

32. There is an actual and justiciable controversy between the Plaintiffs and the Defendants as the result of the certification of Proposition A by Secretary Carnahan and the subsequent adoption of Proposition A as the law of the State of Missouri. L.F. 91.

33. The controversy is ripe for review by this Court given that Proposition A was passed in the November 2, 2010 election and is now part of the laws of the State of Missouri. L.F.92.

35. The Constitution of Missouri (1945) provides that "[t]he initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby...." Article III, Section. 51. L.F. 92.

37. The changes to the earnings tax law adopted in Proposition A violate Article. III, Section 51 of the Missouri Constitution because they require Kansas City to hold an election on the next general municipal election date in order to continue the earnings and net profits tax for an additional five years without also providing for a new source of revenue which can then be appropriated to pay for the cost of this election. Proposition A burdens Kansas City with the costs of such an election, thereby becoming a de facto appropriation by voters statewide of Kansas City funds for the purpose of this election, which violates Article. III, Section 51 of the Missouri Constitution. A single-issue election will cost Kansas City at least $200,000. L.F.92-93.

38. If Kansas City voters approve the continuation of the tax on the next general municipal election date in April 2011, the amendments to the earnings tax law contained in Proposition A will require Kansas City to continue to hold elections every five years, but do not make an appropriation to pay for those elections. Proposition A burdens Kansas City with the costs of holding these recurring elections and, for each of these successive elections, becomes a de facto appropriation by voters statewide of Kansas City funds for the purposes of paying for each of these successive elections, which again violates Article. III, Section 51 of the Missouri Constitution. L.F. 93.

The trial court should have limited its review of Count II of Second Amended Petition to whether the elements of a claim for declaratory judgment had been pleaded. Instead, the court analyzed the initiative and prematurely ruled on the merits of Count II in its Order and Judgment, which held:

> Initiative Petition 2010-077 proposed and adopted by the people terminates the prior authority of the City of Kansas City (the "City") to continue to impose an earnings tax absent a vote of the citizens of the City. Should the City choose not to have an earnings tax in the future, no expenditure is required. This is a choice made by the City and as such, does not constitute an appropriation by initiative. Accordingly, Count II fails to state a claim upon which relief may be granted and is dismissed with prejudice.

The Second Amended Petition pleaded that the initiative required Kansas City to appropriate funds for the costs of the earnings tax renewal elections and sought a declaratory judgment that this amounted to a violation of the No Appropriations Clause of Article III, Section 51 of the Missouri Constitution. Under the standard of review for a motion to dismiss, the trial court was to take this allegation as true and not to weigh its credibility or persuasiveness. *Keveney,* 304 S.W.3d at 101. Instead the trial court engaged in its own analysis of the statutory changes resulting from adoption of the initiative to conclude that Kansas City could avoid election expenditures if the City made a choice not to have an earnings tax in the future. The trial court's analysis went to the ultimate issue of whether the initiative violated the No Appropriations Clause and not the threshold question of whether a claim for declaratory relief had been pleaded.

By ruling on the merits of a claim while dismissing it, a trial court implicitly acknowledges that the petition has stated a claim. *Sandy v. Schriro,* 39 S.W.3d at 856. "This is procedurally contradictory; i.e., the court cannot dismiss appellant's petition for failure to state a claim by finding in favor of respondent on the merits." *Id.* By analyzing the facts pleaded and finding, as the judge reasoned, that Proposition A offered a choice by which Kansas City might avoid appropriating funds for renewal elections, Judge Beetem implicitly acknowledged that Count II stated a claim for a declaratory judgment as to whether the initiative violated the No Appropriations Clause of Article III, Section 51 of the Missouri Constitution.

Not only did the trial court commit error by prematurely ruling on the merits, its ruling on the merits was based on an erroneous analysis. As stated in the Second

Amended Petition, Proposition A acts as a *de facto* appropriation. Proposition A requires periodic elections to continue the earnings tax. Funds must be appropriated by government to pay the costs of elections. Proposition A fails to provide new revenues for the costs of the earnings tax renewal elections. By requiring the tax renewal elections and providing no new revenues for the elections, Proposition A forces Kansas City to make appropriations because Kansas City cannot hold the required elections without appropriating the funds to cover the costs. It does not matter if Proposition A does not expressly appropriate money; if it leaves no discretion to the city council it violates Article III Section 51 as an unconstitutional appropriation measure. *Kansas City v. McGee,* 364 Mo. 896, 269 S.W.2d 662, 666 (1954).

In the *McGee* case a local initiative petition proposed a city ordinance to create a pension fund for Kansas City firefighters without any provision to raise the revenue needed for the pension fund. The opinion of this Court in *McGee* stated:

> What we do hold is that Sec. 51 of the Constitution, supra, requires that if such a law is to be enacted through the initiative, it can only be done by making provision for the new revenue to pay the bill. The proposed ordinance is fatally defective in this respect. It is true that the proposed ordinance does not in and of itself appropriate the money to carry out the pension plan but it does not leave any discretion to the City Council. *Id.,* at 665-66.

The trial court ruled that the initiative did not require Kansas City to appropriate funds because the city could choose not to have an earnings tax in the future. The trial

court's concept of choice does not conform to its plain and ordinary meaning, which involves a voluntary decision. As defined in the dictionary, choice is "the act of choosing; typically: the *voluntary* and purposive or deliberate action of picking, singling out or selecting from two or more that which is favored or superior." (emphasis added) WEBSTERS'S THIRD NEW INTERNATIONAL DICTIONARY 395 (1976). Proposition A deprived Kansas City of the right to keep the status quo and presented the city with an involuntary decision between two costly alternatives. The status quo was to continue the earnings tax as the city's principal revenue source as previously authorized by its citizens without any sunset of the tax. Before the adoption of Proposition A, the earnings tax enabling statutes and the Kansas City Charter authorized an earnings tax without any requirements for a sunset or renewal elections. Proposition A imposed new requirements for continuation of the earnings tax that did not exist under prior state law or the Kansas City Charter.

Each of the forced alternatives under Proposition A created a new burden or loss to the Kansas City with no corresponding benefit. Renewing the tax came with the burden of appropriating city funds to pay for the costs of the tax renewal elections. Not renewing the tax meant the loss of the city's largest single source of revenue. Consequently, the trial court's alternative of allowing the earnings tax to expire is not a true choice, a free and voluntary decision, but a Hobson's choice.

The Appellants were entitled to present evidence on their claim in Count II that Proposition A violated Article III, Section 51 of the Missouri Constitution as an illegal use of the initiative for the appropriation of money. By exceeding the scope of review for

a motion to dismiss by ruling on the merits, the trial court deprived Appellants of that right.

Point II

The trial court erred in dismissing Count II of the Second Amended Petition because, like the particular ground the trial court ruled on, each of the alternative grounds for dismissal advanced by the Respondents would not have sustained the dismissal, in that Respondents' ground that the prohibition on appropriations by initiative in Mo. Const. art. III, §51 (1945) did not apply to a statewide initiative requiring a local appropriation went to the merits of the claim for declaratory judgment, as did the Respondents' ground that the initiative did not violate the No Appropriations Clause in so far as the costs of the earnings tax renewal elections could be paid for out of the earnings tax that the initiative purportedly authorized.

Standard of Review

Appellate court review of a trial court's grant of a motion to dismiss is *de novo.* The appellate court is to consider only the grounds raised in the motion to dismiss in determining whether the trial court was correct in dismissing the petition. *City of Lake Saint Louis,* 324 S.W. 3d at 756. "The appellate court must affirm the trial court's ruling if the motion to dismiss could have been sustained on any of the meritorious grounds raised in the motion regardless of whether the trial court ruled on that particular ground." *Kixmiller v. Board of Curators of Lincoln University,* 341 S.W.3d 711, 713 (Mo. App.W.D. 2011).

"A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. The plaintiff's allegations are taken as true, and no attempt is made to weigh any facts alleged as to whether they are credible or persuasive. The petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action or of a cause that might be adopted in that case." *Keveney v. Missouri Military Academy,* 304 S.W.3d at101.

"[I]t is not the function of the trial court on a motion to dismiss or of this court on an appeal from a judgment of dismissal to make an analysis of the law under which the rights are claimed or to construe the statutes in question or to determine on the merits whether plaintiff is entitled to the declaratory relief he seeks in accordance with the theory he states." *City of Creve Coeur v. Creve Coeur Fire Protec. Dist.*, 355 S.W.2d at 859-60.

Argument

The motions to dismiss filed by the Respondents asserted two alternative grounds in addition to the ground which the trial court adopted in its judgment of dismissal. The dismissal must be affirmed if this Court finds that the motions to dismiss could have been sustained on any meritorious grounds raised below. *Kixmiller, Id.* These two additional grounds, however, do not support dismissal, because, like the ground adopted by the trial court, they go to the merits of the declaratory judgment. In ruling on a motion to dismiss, the trial court is not to "make an analysis of the law under which the rights or claimed or to construe the statutes in question or to determine on the merits whether plaintiff is

entitled to the declaratory relief he seeks in accordance with the theory he states." *City of Creve Coeur,* 355 S.W.2d at 859-60.

In their separate motions to dismiss the Respondents each asserted as a ground for dismissal that the No Appropriations Clause of Article III, Section 51 applies only when the voters of a particular governmental jurisdiction adopt a measure by initiative requiring a non-discretionary expenditure of funds *by that same governmental jurisdiction.* L.F. 145. According to this argument, "Article III, Section 51 is intended to act wholly internal to a single jurisdiction and is not intended to restrain the retained power under the state constitution of a superior governmental authority." L.F. 145.

Clearly this argument requires an interpretation of Article III, Section 51, and as such, goes to one of the ultimate questions for which the Appellants are seeking a declaratory judgment: May the people of the state use the power of the initiative to require an activity of local government when that activity cannot be conducted without an appropriation, and the initiative creates no new revenue for the appropriation? Because this ground goes to the merits of Count II of the Second Amended Petition, it cannot sustain the trial court's dismissal. *City of Creve Coeur, Id.*

Intervenor-Respondents argued below that "[a]s the cases on Article III, Section 51 show, the No Appropriations Clause applies only when the voters of a particular governmental jurisdiction approve a measure by initiative that has the effect of requiring a non-discretionary expenditure of funds by that same particular governmental jurisdiction," citing *State ex rel. Card v. Kaufman,* 517 S.W.2d 78, 80 (Mo. 1974). L.F. 127. They further argued that "[t]he intent of Article III, Section 51, was to prevent the

voters of a local jurisdiction from potentially violating budget laws and process limitations placed on that local jurisdiction," citing *McGee,* 269 S.W.2d at 665. L.F. 127. What Respondents' arguments really show, based on the few decided cases, is that the issue raised in Count II of the people of the state imposing an appropriation on a local government through the initiative is an important question of first impression on which the Appellants were entitled to a declaratory judgment.

Further, Respondents' argument is not supported by the plain meaning of Article III, Section 51 which simply states that the prohibition on appropriations applies to "the initiative," which one must reasonably interpret as including *any* initiative, whether at the state or local level. Article III, Section 51 contains no restrictive or qualifying words or phrases to suggest, as Respondents have, that the Missouri Constitution would allow voters in a statewide initiative to use the initiative power to force a city or other local governmental body to make an appropriation. Under the rules of constitutional interpretation, "[T]here is accordingly no authority for this Court to read into the Constitution words that are not there." *Nat. Educ. Ass'n v. Independence School District,* 223 S.W.3d 131, 137 (Mo. 2007). The plain meaning rule applies to interpreting the Missouri Constitution. *Kuyper v. Stone County Com.,* 838 S.W.2d 436, 437 (Mo. banc 1992). "The fundamental purpose of constitutional construction is to give effect to the intent of the voters. Traditional rules of construction dictate looking at words in the context of both the particular provision in which they are located and the entire amendment in which the provision is located." *Keller v. Marion County Ambulance Dist.,* 820 S.W.2d 301, 302 (Mo. banc 1991).

If anything, the need for protection from an initiative-imposed appropriation is greater when voters at the state level are attempting to impose that burden on a local government. The potential for misuse of the power of the initiative is greater where, as is the case with Proposition A, voters outside of Kansas City are dictating that the city must make an appropriation for local tax renewal elections and bear the costs of those elections.

Municipal appropriations are subject to the restrictions of Article VI, Section 26(a) of the Missouri Constitution, which prohibits any city from becoming indebted in an amount exceeding in any year the income and revenue provided for such year, plus any unencumbered balance from previous years. "It would be difficult for a city council to comply with that constitutional provision if appropriations could be made through the initiative process." *McGee,* 269 S.W.2d at 665. The duty of a municipal government to comply with Article VI, Section 26(a) would be undermined if it were true, as the Respondents contend, that the people of the State, as a superior governmental authority, have the power through the initiative to require a city to make appropriations.

In their separate motion to dismiss, the Respondents Carnahan and the State of Missouri asserted an additional ground for dismissal of the Second Amended Petition that was not adopted as the basis for the trial court's ruling. Secretary Carnahan and the State rely on the holding in *Committee for a Healthy Future v. Carnahan,* 201 S.W.3d 503, 510 (Mo. 2006) for the proposition that "[E]ven if this Court determines that putting the earnings tax issue before the voters is a requirement of Proposition A, and that the holding of municipal elections is an action requiring the appropriation of City funds,

Count II still fails because those additional costs could be paid for out of the money generated by the earnings tax the initiative authorized." L.F. 185.

This assertion by Secretary Carnahan and the State reaches outside the facts alleged in Count II because it would have required the trial court to make a finding that Proposition A created new revenues to pay for the earnings tax renewal elections. It would have required the trial court to analyze and interpret both Proposition A and Article III, Section 51 of the Missouri Constitution. Had this ground been adopted by the trial court in its ruling it would not have sustained a dismissal because it would have constituted a ruling on the merits. "This is procedurally contradictory; i.e. the court cannot dismiss appellant's petition for failure to state a claim by finding in favor of respondent on the merits." *Sandy v. Schriro,* 39. S.W.3d at 856.

The ruling in *Committee for a Healthy Future, Id.,* involved the new revenues exception of Article III, Section 51, which states, in pertinent part, "The initiative shall not be used for the appropriation of money *other than of new revenues created and provided for thereby..."* Mo. Const. art. III, §51 (1945). Respondents' reliance on *Committee for a Healthy Future* and the new revenues exception is inapposite for two reasons. First, unlike the initiative in *Committee for a Healthy Future,* Proposition A created no new revenues. The initiative in *Committee for a Healthy Future* was designed to create new revenue by increasing the tax on tobacco products. *Committee for a Healthy Future,* 201 S.W.3d at 506. The Kansas City earnings tax is not new revenue. The earnings tax was first authorized by the Missouri General Assembly when it enacted the enabling statutes in 1963. L.F. 87. Kansas City has received revenue from the

earnings tax since 1963, and the one percent rate has been in force since 1970. L.F. 88. Proposition A would more aptly be described as a tax *deauthorization* or *reauthorization.* It bars any city not currently levying an earnings tax from ever instituting an earnings tax. Its sunset provision would eliminate the Kansas City and St. Louis earnings tax in stages over ten years if renewal elections were not held or if local voters failed to approve continuation of the tax at one of the renewal elections. L.F. 101-03.

Second, the new revenues argument fails because Kansas City will incur costs for the renewal elections regardless of the outcome of the vote. If the local electorate voted not to continue the tax in a given renewal election, Kansas City would still have to bear the election costs despite the loss of revenue from the phase-out of the tax.

Point III

The trial court erred in dismissing Count III of Appellants' Second Amended Petition for failure to state a claim because Appellants stated facts entitling them to a declaration of rights and the trial court exceeded its standard of review in reaching the merits of Appellants' claim in that Appellants alleged that the earnings tax initiative violated the Hancock Amendment of the Missouri Constitution as an unfunded mandate because it required a new activity of the City – elections every five years – but failed to provide state financing to fund the elections; and the trial court, by determining that the City could simply choose not to have an earnings tax, reached the merits of the Appellants' argument, implicitly acknowledging that Appellants had stated a claim for declaratory relief.

Standard of Review

The standard of review for a judgment of dismissal is *de novo*. *State of Missouri ex rel. American Eagle Waste Industries*, 272 S.W.3d at 340. In reviewing the dismissal of Appellants' declaratory judgment action, the court deems all facts pleaded as true, liberally construes the averments contained in the petition, and draws all reasonable and fair inferences therefrom. *Sandy,* 39 S.W.3d at 855.

"To sufficiently state a claim for declaratory judgment, the petition need only allege facts that invoke substantive legal principles which entitle the petitioner to relief." *American Eagle Waste Industries*, 272 S.W.3d at 340. If the petition does so, it cannot be dismissed for failure to state a claim. *Sandy*, 39 S.W.3d at 855. "In other words, if the petition contains facts, not mere conclusions, supporting its allegations, and those facts demonstrate a justiciable controversy, then we will reverse the court's dismissal and remand the cause to the court for a determination of the parties' rights." *Id.* at 855.

Argument

The ground relied on by the trial court in dismissing Count III of Appellants' petition was failure to state a claim. Accordingly, the sole question before this Court is whether the second amended petition alleges facts which entitle the Appellants to a declaration of rights. *State of Missouri ex rel. American Eagle Waste Industries*, 272 S.W.3d at 340. Appellants are not required to prove that they will prevail under their interpretation of the provisions of the Missouri Constitution upon which they rely, or

even that their interpretation is correct; they simply need to show they are entitled to an interpretation at all. *Id; See also City of Creve Coeur*, 355 S.W.2d. at 859.

The trial court relied on the same analysis to dismiss both Counts II and III of Appellants' petition[2], stating the following in its judgment:

> Initiative Petition 2010-077 proposed by and adopted by the people terminates the prior authority of the City of Kansas City (the "City") to continue to impose an earnings tax absent a vote of the citizens of the City. Should the City choose not to have an earnings tax in the future, no expenditure is required. On the other hand, should they choose to have an earnings tax in the future, they must now have an election. This is a choice to be made by the City and as such, does not constitute an appropriation by initiative. Accordingly, Count II fails to state a claim upon which relief may be granted and is dismissed with prejudice.

L.F. 215.

The trial court appears to have relied on the second basis for dismissal raised by Intervenor-Respondents in their motion to dismiss, in which they argued that the because the City is not required by statute to have an earnings tax, the election to continue the tax is not a requirement as contemplated by sections 16 and 21 of Article X of the Missouri

[2] The trial court set forth its reasoning for dismissal of Count II in the judgment, and then stated that "a similar analysis" required the dismissal of Count III.

Constitution ("Hancock Amendment"). L.F. 130-132. Defendant-Respondents joined in this argument. L.F. 187.

Appellants alleged the following in Count III of their second amended petition:

> 46. The Missouri Constitution provides that '[t]he state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing....' Mo. Const. Article X, Section 16.
>
> 47. The Missouri Constitution further provides that '[a] new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the General Assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs.' Mo. Const. Article X, Section 21.
>
> 48. The amendments to the earnings tax law contained in Proposition A violate Article X, Sections 16 and 21 of the Missouri Constitution as an unfunded mandate because they require a new activity of the City – the periodic elections beginning on the next general municipal election date after the effective date of Proposition A – but do not provide state financing to fund the elections. A single-issue election will cost Kansas City at least $200,000.

WHEREFORE, the Plaintiffs request that the Court find and declare that the amendments to the earnings tax enabling law resulting from the passage of Proposition A violate Article X, Sections 16 and 21 of the Missouri Constitution as an unfunded mandate; that such amendments also violate Article III, Section 51 of the Missouri Constitution by using the initiative process for a purpose prohibited by the Constitution; that Proposition A also violated Article III, Section 50 of the Missouri Constitution by failing to disclose such Hancock violations; that Defendant Carnahan's certification of Proposition A for the November 2, 2010 election was invalid, that the amendments to the earnings tax law under Proposition A are null and void as unconstitutional that the Kansas City earnings tax enabling law in effect prior to the passage of Proposition A – RSMo Section 92.210 through 92.300 – shall remain in effect; that the Kansas City earnings tax shall continue without the necessity of the elections specified under Proposition A, and for such other relief as the Court deems just.

L.F. 95-96.

A violation of sections 16 and 21 of the Hancock Amendment exists if both (1) a new or increased activity or service is required of a political subdivision by the state and (2) the political subdivision experiences increased costs in performing that activity or service. *Miller v. Director of Revenue*, 719 S.W.2d 787, 788-89 (Mo. 1986); *Brooks v.*

State, 128 S.W.3d 844, 848 (Mo. 2004)(holding that sections 16 and 21 are of the same effect).

Appellants alleged facts entitling them to a declaration of rights because Appellants argued that Proposition A required a new activity – elections every five years – and that a single issue election would cost the City at least $200,000.

Intervenor-Respondents argued in their motion to dismiss that the elections were not required, because the City could simply choose not to have an earnings tax. In other words, they argued that because the underlying activity – the earnings tax – was discretionary, the elections that were required to continue the earnings tax were not required for purposes of establishing a Hancock violation. The trial court's determination that because the City is not required to have an earnings tax the elections required to continue the tax are not "required" for purposes of determining whether there was a Hancock violation was a decision on the merits that is procedurally inconsistent with a dismissal for failure to state a claim, and thus improper. *State of Missouri ex rel. American Eagle Waste Industries*, 272 S.W.3d at 341. "[B]y engaging in a determination on the merits, the trial court implicitly acknowledged that [Appellants] had stated a claim for declaratory relief. *Id.*

In *City of Creve Coeur*, this Court explained the high burden a defendant has in arguing for dismissal of a petition for declaratory judgment, noting two instances where dismissal is appropriate: (1) when the authority cited by plaintiff is "wholly irrelevant" to a determination of rights between plaintiff and defendant; or (2) "if it is obvious beyond peradventure of doubt that any claim for a declaration of rights under any

construction of the statutes in question is wholly without substance." 355 S.W.2d. at 859. Unless it can be said with certainty that there is no basis for Appellants' contention that they are entitled to a declaration of rights, Appellants are entitled to the opportunity to present evidence to sustain the allegations in their petition.

A review of the authority relied on by the parties shows that Respondents have not met the burden required to justify a dismissal either by showing that the authority relied on by Appellants is "wholly irrelevant" or by showing that Appellants' claim for a declaration of rights is "wholly without substance." In fact, quite the opposite is true, as Intervenor-Respondents advanced a theory in their motion to dismiss that was overruled by this Court in *Missouri Municipal League v. State of Missouri*, 932 S.W.2d 400 (Mo. 1996).

Interventor-Respondents argued that while the City is required to hold elections in order to continue the earnings tax, the City is not required to have an earnings tax. So, they argue that the elections are not "required" for purposes of establishing a Hancock violation. Such an argument mischaracterizes the issue. The issue is not whether the City is required to have an earnings tax. The issue is whether the City is required to engage in a new activity in order to continue an existing activity. If the answer is "yes," there is a Hancock violation. It makes no difference if the existing activity – the earnings tax – is discretionary. *Id.*

In the *Missouri Municipal League* case, the state reduced the amount of funding it provided to municipalities for the testing of drinking water. *Id.* at 402. At issue in the case was whether water testing was a required activity. *Id.* at 401. The state argued that

because providing water is a "discretionary activity," water testing is not "required" for purposes of determining whether a Hancock violation existed. *Id.* at 402. This court held that it made no difference whether the underlying activity – providing water – was discretionary. *Id.* at 403.

The court noted that prior to passage of the Hancock Amendment in 1980, the state was responsible for providing water testing free of charge. *Id.* at 401. Section 21 of the Hancock Amendment, adopted in 1980, provided that the state was prohibited from reducing "the state financed portion of the costs of any existing activity or service required of counties and other political subdivisions" as of the effective date of the amendment. *Id.* In 1982, the legislature passed a statute allowing the state to collect fees for water testing. *Id.* at 402. The court noted that passage of this legislation resulted in the state funding 88 percent of the cost of water testing, and political subdivisions funding 12 percent. *Id.* at 401.

In determining whether an activity is required for the purposes of Hancock, this Court explained that if a sanction exists for failure to conduct the activity, it is required. *Id.* at 402. The court noted that if a municipality did not conduct water testing, it would be subject to fines or loss of its operating permit. *Id.* at 402. Accordingly, the court held that water testing was a required activity.

The state argued that because providing water is a discretionary activity, water testing is not "required" of a political subdivision. *Id.* The state relied on *State ex rel. City of Springfield v. Missouri Pub. Serv. Comm'n* for the proposition that where a city is performing a discretionary function, any law that results in an increase in cost to the city

relating to that function is not a violation of Hancock. *Id.* at 402. In *City of Springfield*, the Western District Court of Appeals held that even if new gas safety rules imposed a new activity on political subdivisions, they did not violate Hancock because providing gas was a discretionary function. 812 S.W.2d 827, 831 (Mo. W.D. 1991).

This Court rejected that argument and overruled *City of Springfield*, holding that for the purposes of establishing a Hancock violation, it does not matter if the underlying activity is discretionary. *Missouri Municipal League*, 932 S.W.2d at 403. The court concluded that once the state imposes a requirement on a political subdivision, it makes no difference whether the underlying act is discretionary for purposes of determining if there is a Hancock violation *Id.* The court noted that Article X, section 21 does not distinguish between governmental or proprietary functions, but refers to "*any* existing activity or service." *Id.* Similarly, Article X, section 16 prohibits the state from requiring "*any* new or expanded activities…without full state financing."

While Intervenor-Respondents did not cite to *City of Springfield* in their motion, they advanced the same argument this court rejected in overruling the case by arguing that the election required to continue the earnings tax is not "required" under the Hancock Amendment because the earnings tax is "voluntary." L.F. 130. The City's earnings tax has been in existence prior to the Hancock Amendment. While it's true the City is not required to have an earnings tax, the City is clearly required, following the passage of Proposition A, to have elections every five years in order to continue the earnings tax.

The official ballot title for Proposition A stated the following: "Shall Missouri law be amended to…**require voters in cities that currently have an earnings tax to**

approve continuation of such tax at the next general municipal election and at an election held every 5 years thereafter." L.F. 89. Section 92.105 states the following: "It is the intent of sections 92.105 to 92.125 that starting in 2011, **voters in any city imposing an earnings tax will decide in local elections** to continue the earnings tax." L.F. 101. The provision does not use the permissive "may" but states that voters "will" decide the issue in **local elections**.

Additionally, there is a sanction if a city fails to hold the periodic elections. Section 92.110.1 states: "if no such election is held…such city **shall no longer be authorized to impose or levy such earnings tax** except to reduce such tax in the manner provided by section 92.125." L.F. 101.

The Hancock Amendment's official ballot title stated that it prohibited "'state expansion of local responsibility without state funding'" *Neske v. City of St. Louis*, 218 S.W.3d 417, 422 (Mo. 2007). "Above all else, the Hancock Amendment is crafted . . . to *maintain the status quo*." *Harrison v. Monroe Cty.*, 1986 Mo. LEXIS 301, 20-21 (Mo. 1986). Prior to the passage of Hancock, there was no requirement for the City to pay for an election every five years to continue the tax. Following the passage of Proposition A, the City is required to pay for an election every five years to continue the tax. This constitutes an unfunded mandate in violation of the Hancock Amendment. After the passage of Proposition A, the City cannot maintain the status quo without holding an election.

The trial court ruled on the merits of Appellants' claim by adopting the argument advanced by Intervenor-Respondents and holding that because the City is not required to

have an earnings tax, the election that is required for the City to continue the tax is not "required" for the proposes of establishing a violation of the Hancock Amendment. By engaging in a determination of the merits, the trial court implicitly acknowledged that Appellants had stated a claim. *American Eagle Waste Industries*, 272 S.W.3d at 341. Appellants are entitled the opportunity to present evidence to sustain the allegations in their petition and this case should be remanded to the trial court for a full determination on the merits.

Point IV

The trial court erred in dismissing Count III of Appellants' Second Amended Petition for failure to state a claim because Respondents' argument that "the power of taxation" is not an activity or service under the Hancock Amendment would not have sustained a dismissal in that Appellants argued that the new activity required by Proposition A was the periodic elections required to continue the earnings tax and not the tax itself; and the argument that there is no violation of the Hancock Amendment because the earnings tax does not fall within the definition of "any activity or service" requires an interpretation of the Missouri Constitution and a judgment on the merits.

Standard of Review

Appellate court review of a trial court's grant of a motion to dismiss is *de novo*. *State of Missouri ex rel. American Eagle Waste Industries*, 272 S.W.3d at 340. The appellate court is to consider only the grounds raised in the motion to dismiss in determining whether the trial court was correct in dismissing the petition. *City of Lake*

Saint Louis, 324 S.W. 3d at 756. "The appellate court must affirm the trial court's ruling if the motion to dismiss could have been sustained on any of the meritorious grounds raised in the motion regardless of whether the trial court ruled on that particular ground." *Kixmiller,* 341 S.W.3d at 713. Accordingly, Appellants will also address the arguments raised by Respondents that were not the basis of the trial court's ruling.

The sole question before this Court is whether the second amended petition alleges facts which entitle the Appellants to a declaration of rights. *State of Missouri ex rel. American Eagle Waste Industries*, 272 S.W.3d at 340. Appellants are not required to prove that they will prevail under their interpretation of the provisions of the Missouri Constitution upon which they rely, or even that their interpretation is correct; they simply need to show they are entitled to an interpretation at all. *Id; See also City of Creve Coeur*, 355 S.W.2d. at 859.

Argument

The first argument raised by Intervenor-Respondents in their motion to dismiss was that Proposition A did not involve either an activity or service as contemplated by the Hancock Amendment, because they claim "the power of taxation" is not an activity or service under Hancock. L.F. 129. This argument would not warrant a dismissal because it does not address the argument raised by Appellants in their second amended petition. Appellants argued in Count III of their second amended petition that the new activity required by Proposition A was the periodic elections required in order to continue the earnings tax, not the tax itself. L.F. 95-96. Intervenor-Respondents mischaracterize the

issue by focusing on the underlying activity at issue instead of the new election requirement.

Additionally, even if it were true that because the election requirement concerns the continuation of the earnings tax, the issue before the court is not whether the election is an activity, but whether issues concerning "the taxing power" are activities under Hancock, such an argument clearly requires an interpretation of the Missouri Constitution and would therefore require a judgment on the merits. Because this argument would require an analysis of law to determine whether the earnings tax falls within the definition of "*any* activity," it cannot sustain dismissal of Appellants' petition. *City of Creve Coeur*, 355 S.W.2d. at 859.

Further, Respondents' argument is not supported by the plain meaning of sections 16 and 21 of Article X, which apply to "*any* new or expanded activities" or "*any* existing activity or service." The Hancock Amendment "is broad enough to cover all functions of a municipality[.]" *Loving v. City of St. Joseph*, 753 S.W.2d 49, 51 (Mo. App. W.D. 1988).[3]

Missouri courts have given broad meaning to the words "activity" and "service" when interpreting the Hancock Amendment. "Rules applicable to constitutional construction are the same as those applied to statutory construction, except that the

[3] The *Loving* case concerned Section 22 of Article X, but this court applied the same rationale to section 21 of Article X, noting that both sections use the term "any". *Missouri Municipal League*, 932 S.W.2d at 403.

former are given a broader construction, due to their more permanent character." *State at the Information of Martin v. City of Independence,* 518 S.W.2d 63, 65 (Mo. 1974). When determining the meaning of a constitutional provision, courts first try to determine the meaning that was conveyed to the voters when the provision was adopted. *State at the Information of Danforth v. Cason,* 507 S.W.2d 405, 408 (Mo. banc 1973). The drafters of Section 21 of the Hancock amendment intended "to include *all State mandated cost increases in this provision*, including but not limited to: *changes in general law which increase local government cost*, i.e., increases in the state minimum wage law, changes in the civil and criminal statutes, e.g., mandatory sentencing; federally encouraged changes in state law, e.g., unemployment compensation; collective bargaining or compulsory arbitration mandates, land-use regulations, etc." *Boone County Court v. State of Missouri,* 631, S.W.2d 321, 324 (Mo. 1982)(quoting a memorandum from the Taxpayers Survival Association, the organization of which Mr. Hancock was the chairman and which drafted the Amendment).

It is clear from the above that the election requirement falls within the broad definition of "activity" contained in the Hancock Amendment. Moreover, it is equally clear that changes to *any* state law, including laws concerning the taxing power, must comply with the requirements of the Missouri Constitution, including the provisions of the Hancock Amendment.

A central purpose of the Hancock Amendment was to prevent the state from mandating new or increased levels of service by political subdivisions without providing state funding. *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 13 (Mo. 1981). The official

ballot title stated that the Hancock Amendment "'Prohibits state expansion of local responsibility without state funding.'" *Id.* Section 16 prohibits the State from imposing "*any* new or expanded activities." Section 20 prohibits "[a] new activity or service or an increase in the level of any activity or service."

The word 'any' as used in a constitutional provision is all comprehensive, and is equivalent to "every." *State ex rel. Randolph County v. Walden*, 206 S.W.2d 979, 983 (Mo. 1947). Hancock applies to *every* law, without exception, including laws regarding the "taxing power."

Taxes are levied by the government "for the support of government and for all public needs." *State v. City of Springfield*, 812 S.W.2d at 831. Accordingly, the imposition of taxes is a government activity undertaken to serve public needs. Kansas City uses its earnings tax revenue to provide a variety of municipal services, including law enforcement, fire suppression and ambulance services. L.F. 91.

The new activity at issue in this case is the election requirement to continue the earnings tax, and there is simply no support for Intervenor-Respondents' argument that the Hancock Amendment does not apply when the underlying activity at issue involves taxation.

Point V

The trial court erred in dismissing Count III of Appellants' Second Amended Petition for failure to state a claim because Respondents' argument that the Hancock Amendment does not apply to legislation enacted through the initiative would not have sustained a dismissal in that the argument requires an

interpretation of the Missouri Constitution and a judgment on the merits; and the plain language of Section 16 of the Hancock Amendment applies to legislation enacted through the initiative process.

Standard of Review

Appellate court review of a trial court's grant of a motion to dismiss is *de novo*. *State of Missouri ex rel. American Eagle Waste Industries*, 272 S.W.3d at 340. The appellate court is to consider only the grounds raised in the motion to dismiss in determining whether the trial court was correct in dismissing the petition. *City of Lake Saint Louis,* 324 S.W. 3d at 756. "The appellate court must affirm the trial court's ruling if the motion to dismiss could have been sustained on any of the meritorious grounds raised in the motion regardless of whether the trial court ruled on that particular ground." *Kixmiller,* 341 S.W.3d at 713.

The sole question before this Court is whether the second amended petition alleges facts which entitle the Appellants to a declaration of rights. *State of Missouri ex rel. American Eagle Waste Industries*, 272 S.W.3d at 340. Appellants are not required to prove that they will prevail under their interpretation of the provisions of the Missouri Constitution upon which they rely, or even that their interpretation is correct; they simply need to show they are entitled to an interpretation at all. *Id; See also City of Creve Coeur*, 355 S.W.2d. at 859.

Argument

Intervenor-Respondents argued in their motion to dismiss that the Hancock Amendment acts as a restriction on the power of the Legislature to enact legislation, but not on the power of the people to do so through the initiative. L.F. 132. Such an argument requires an interpretation of the text of sections 16 and 21 of Article X of the Missouri Constitution. Because this argument would require an analysis of law to determine on the merits whether Appellants are entitled to the relief they seek, it cannot sustain dismissal of Appellants' petition. *City of Creve Coeur*, 355 S.W.2d. at 859.

Additionally, the plain language of Section 16 of Article X shows that it applies to legislation enacted through the initiative. Intervenor-Respondents noted that Article X, Section 21 prohibits unfunded mandates by "the General Assembly or any state agency," and concluded that this provision has no application to legislation enacted by the people. What they failed to mention is that Section 16 of Article X forbids "the state" from imposing unfunded mandates against local governments.

When construing a constitutional provision, the words are to be given their plain and ordinary meaning. *In re Finnegan*, 327 S.W.3d 524, 526 (Mo. 2010). "The state" can be used to describe both the people of a state and also the governing body of those people. The dictionary defines "state" as both "a body of people permanently occupying a definite territory and politically organized under a sovereign government...." and "the political organization that has supreme civil authority and political power and serves as the basis of government." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2228 (1976). The first definition for "state" found in Black's Law Dictionary is "**a people**

permanently occupying a fixed territory bound together by common-law habits and custom into one body politic...." BLACK'S LAW DICTIONARY 1407 (6th ed. 1990).

The rules of construction also provide that different words used in the same enactment are to be given different meanings. *Christensen v. Am. Food & Vending Servs.*, 191 S.W.3d 88, 92 (Mo. Ct. App. 2006). Following this rule, "state" must mean something other than "General Assembly." The only logical conclusion is that "state" in is context includes "the people." Allowing "the people of *Missouri*" to impose the election requirement contained in Proposition A on "the people of the *Kansas City*" is the very definition of a state-imposed unfunded mandate.

Moreover, the initiative is not intended to be a mechanism to pass legislation that is otherwise prohibited. Article III, section 51 of the Missouri Constitution states as follows: "The initiative shall not be used...for any other purpose prohibited by this constitution." The initiative is simply an additional method for the adoption of legislation. Most legislation is adopted by the people through their chosen representatives. The initiative provides a method for direct legislation by the people. *State ex rel. Voss v. Davis*, 418 S.W.2d 163, 169 (Mo. 1967). The fact that such method is pursued, however, adds no additional validity to the legislation. *Baum v. City of St. Louis*, 123 S.W.2d 48, 50 (Mo. 1938).

The Hancock Amendment prohibits "state expansion of local responsibility." *Miller v. Director of Revenue*, 719 S.W.2d 787, 788-89 (Mo. 1986). Its purpose is defeated if the people of Missouri are given the power to impose the same unfunded mandates their elected state representatives may not impose.

Point VI

The trial court erred in dismissing Count III of Appellants' Second Amended Petition for failure to state a claim because Respondents' argument that the elections required by Proposition A are not a new activity would not warrant a dismissal in that Appellants alleged in their petition and the plain language of Proposition A shows that the requirement to hold an election every five years in order to continue the earnings tax is a new requirement that did not exist prior to the passage of Proposition A.

Standard of Review

Appellate court review of a trial court's grant of a motion to dismiss is *de novo. State of Missouri ex rel. American Eagle Waste Industries*, 272 S.W.3d at 340. The appellate court is to consider only the grounds raised in the motion to dismiss in determining whether the trial court was correct in dismissing the petition. *City of Lake Saint Louis,* 324 S.W. 3d at 756. "The appellate court must affirm the trial court's ruling if the motion to dismiss could have been sustained on any of the meritorious grounds raised in the motion regardless of whether the trial court ruled on that particular ground." *Kixmiller,* 341 S.W.3d at 713.

The sole question before this Court is whether the second amended petition alleges facts which entitle the Appellants to a declaration of rights. *State of Missouri ex rel. American Eagle Waste Industries*, 272 S.W.3d at 340. Appellants are not required to prove that they will prevail under their interpretation of the provisions of the Missouri Constitution upon which they rely, or even that their interpretation is correct; they simply

need to show they are entitled to an interpretation at all. *Id; See also City of Creve Coeur*, 355 S.W.2d. at 859.

Argument

Defendant-Respondents argued on their motion to dismiss that the City "is already required by its Charter to hold both regular and special municipal elections." Accordingly, they claim that putting the issue of the earnings tax before the voters in a local election is not an additional activity or service. L.F. 187.

Respondents' argument that the elections to continue the earnings tax are not a new activity could only be correct if the City would have been required, prior to the passage of Proposition A, to hold an election on April 5, 2011, and to hold subsequent elections every five years thereafter, in April. Because that is not the case, their argument fails.

Contrary to Respondents' argument, while the City Charter does require that the city hold primary and general elections *for the election of its officers* every four years in February and March, respectively, there is no requirement in the Charter for the City to hold elections for issues in April, or on any other date. Section 604 of the City Charter states as follows, in pertinent part:

> Section 604. Election dates.
>
> (a) Regular elections. The City **will hold** a general election on the fourth Tuesday of March, and a primary election four weeks prior to the general election. The next general election will be held on March 27, 2007, and every four years thereafter.

(b) Special elections. The City **may call** special elections for any lawful purpose as provided by state law.

The Charter *authorizes* the City to call elections for issues, but it does not require it. Additionally, prior to the passage of Proposition A, there was no Charter or statutory requirement for the City to hold an election in order to continue the earnings tax. Contrary to Respondents' assertion that the City's "statutory and charter obligations to hold municipal elections were not altered by Proposition A," that is precisely the result of the passage of Proposition A. L.F. 188.

Proposition A left the City with no discretion as to when the elections to continue the earnings tax may be held. Newly adopted section 92.115.1 required the first election to be held on "the next **general municipal election** date immediately following the effective date of this section." The "general municipal election day" is defined by state statute as the first Tuesday following the first Monday in April. 115.121.3 RSMo. The next general municipal election date immediately following the November 2010 election was April 5, 2011. Had the City failed to place the issue on the April 2011 ballot, the earnings tax would have started phasing out in January 2012.

Rather than requiring the City to hold issue elections in April, Missouri law allows the City the discretion to place issues before the voters on the first Tuesday following the first Monday in February, April, June, August and November. §§115.121; 115.123 RSMo. Proposition A, however, denies the City any flexibility whatsoever in choosing a date to hold elections on the earnings tax issue. The hardship this may create for the City

and its residents is best illustrated by considering the elections the City was required to hold in February, March and April of 2011.

In 2011, the City was required to hold its primary and general elections in February and March, respectively. The primary election was on February 22, 2011, and the general election for City officers was held on March 22, 20ll, pursuant to section 604 of the City Charter. A mere two weeks after the Mayoral general election, the City was forced, due to the passage of Proposition A, to hold the earnings tax election on April 5, 2011. This election schedule that was imposed upon the City by passage of Proposition A required the City to ask its citizens to come to the polls three times in six weeks. The City did not have the discretion to wait until June or August to place the issue on the ballot. The City was forced to hold the election in April.

While Respondents may attempt to argue that the City could have placed the issue on the March 22 ballot, the plain language of Proposition A required an April election. When it comes to statutory interpretation, "[e]ach word in the statute or constitutional provision must be given effect." *McNabb v. Board of Education of City of St. Louis*, 1990 Mo. App. LEXIS 1426 *4 -*7 (Mo. App. 1990) ("Giving each word its plain meaning, it is clear that 'the general municipal election day' as used in the constitutional provision is not the same as 'municipal election day' as used in the statute.).

Under *McNabb*, "the general municipal election day" has a specific meaning dictated by state statute, and cannot mean the same thing as a "general election" established by City Charter. Accordingly, giving effect to each word in the newly adopted section 92.115.1, it is clear that the drafters of Proposition A intended to require

the City to place the earnings tax issue before the voters at the "general municipal election date" in April. Had the drafters intended the City to place the issue on the March "general election," the drafters would have "mirrored" the language used in the City Charter and used "identical language" in Proposition A. *McNabb*, 1990 Mo. App. LEXIS 1426 *6. Instead, the drafters mirrored the language of the statute establishing the general municipal election day in April, showing a clear intent to require an April election.

Additionally, while the City's Mayoral and Council elections are every four years, Proposition A requires elections every five years. Accordingly, even assuming *arguendo* that the City could have placed the issue on a March ballot in 2011, the next election on the earnings tax is required to be held in 2016, while the City's next Mayoral election will be held in 2015. Accordingly, March is not an available election date for the City in 2016. The only reasonable conclusion is that the City will again be forced to hold a single-issue election in April 2016.

The requirement to hold an election on April 5, 2011, and the requirement that the City hold subsequent elections every five years on the general municipal election day in April, are new obligations. The failure of the state to pay for the elections renders Proposition A unconstitutional.

Point VII

The trial court erred in dismissing Count IV of Appellants' Second Amended Petition for failure to state a claim because Appellants stated facts entitling them to a declaration of rights and the trial court exceeded its standard of review in

reaching the merits of Appellants' claim in that Appellants alleged that Proposition A used a statewide initiative to amend the City Charter of Kansas City in violation of Article VI, Section 20 of the Missouri Constitution, which sets forth the process for amending a City Charter through a local initiative; and the trial court, by determining that the citizens of the state have the authority through the initiative to amend a City's Charter reached the merits of Appellants' argument, implicitly acknowledging that Appellants had stated a claim for declaratory relief.

Standard of Review

The standard of review for a judgment of dismissal is *de novo*. *State of Missouri ex rel. American Eagle Waste Industries*, 272 S.W.3d at 340. In reviewing the dismissal of Appellants' declaratory judgment action, the court deems all facts pleaded as true, liberally construes the averments contained in the petition, and draws all reasonable and fair inferences therefrom. *Sandy,* 39 S.W.3d at 855.

"To sufficiently state a claim for declaratory judgment, the petition need only allege facts that invoke substantive legal principles which entitle the petitioner to relief." *Id.* at 340. If the petition does so, it cannot be dismissed for failure to state a claim. *Sandy*, 39 S.W.3d at 855. "In other words, if the petition contains facts, not mere conclusions, supporting its allegations, and those facts demonstrate a justiciable controversy, then we will reverse the court's dismissal and remand the cause to the court for a determination of the parties' rights." *Id.* at 855.

Argument

The ground relied on by the trial court in dismissing Count IV of Appellants' petition was failure to state a claim. Accordingly, the sole question before this Court is whether the second amended petition alleges facts which entitle the Appellants to a declaration of rights. *State of Missouri ex rel. American Eagle Waste Industries*, 272 S.W.3d at 340. Appellants are not required to prove that they will prevail under their interpretation of the provisions of the Missouri Constitution upon which they rely, or even that their interpretation is correct; they simply need to show they are entitled to an interpretation at all. *Id; See also City of Creve Coeur*, 355 S.W.2d. at 859.

The trial court stated the following in dismissing Count IV of Appellants' second amended petition:

> With respect to any remaining issues in Count IV and in that the power to limit or deny powers to a constitutional charter city, limited only to issues not relevant herein, rests with the people and/or legislature. That claim will also be dismissed with prejudice.

L.F. 215.

Appellants alleged the following in Count IV of their second amended petition:

> 56. Section 813 of the City Charter, in authorizing Kansas City to levy and collect an earnings tax without recurring elections to reauthorize the tax, mirrors Chapter 92 of the Missouri Revised Statutes as it was written before the passage of Proposition A.

57. With the passage of Proposition A, if Kansas City fails to hold local elections to continue the tax in 2011 and every subsequent five years, Section 813 of the City Charter will automatically be amended, and eventually repealed.

58. Proposition A failed to mention that its passage would result not only in the repeal of certain sections of Chapter 92, but also in the repeal of Section 813 of the City Charter.

59. The failure of Proposition A to disclose to petition signers that it would result in the repeal of a provision of the City Charter is an unconstitutional procedural deficiency which violated the requirement that the petition contain "the full text of the measure."

60. Amendments to a City Charter can be proposed by a City Charter commission or by the legislative body of the City. Mo. Const. Article VI, Section 20.

61. Amendments to a City Charter can also be proposed through the initiative, by a petition signed by not less than ten percent of the registered qualified voters of the City. Mo. Const. Article VI, Section 20.

62. Proposition A proposing changes to Chapter 92 of the Missouri statutes required signatures of an entirely different class of people – five percent of the total state votes cast in the 2008 governor's election from six of the state's nine congressional districts.

63. Amendments to a City Charter cannot be proposed by a petition signed by non City residents.

64. Proposition A failed to disclose that it violated Article VI, Section 20 of the Missouri Constitution by allowing petitioners to use the statewide initiative process to amend the City Charter of Kansas City and obtain signatures from residents outside of the City to place a Charter amendment before the voters, and also allowed residents outside of the City to vote on an amendment to the City Charter.

65. Proposition A is void because it purported to use a statewide initiative to amend the City Charter of Kansas City, and the only valid way in which to amend the City Charter is to follow one of the three processes set forth in Article VI, Section 20 of the Missouri Constitution.

66. The failure of Proposition A to disclose that it proposed legislation that would allow state voters to effectively amend the Kansas City Charter violated the requirement of Mo. Const. Article III, Section 50 that the petition contain "the full text of the measure."

67. The failure of Proposition A to disclose to petition signers that it allows an amendment to the City Charter of Kansas City without requiring signatures from ten percent of the registered voters in the City and instead allows the petitioners to obtain signatures from voters all across the state in contravention of Article VI, Section 20 of the Missouri Constitution

is an unconstitutional procedural deficiency which violated the requirement that the petition contain "the full text of the measure."

WHEREFORE, the Plaintiffs request that the Court find and declare that Proposition A is unconstitutional on its face because it purported to use a statewide initiative to amend the City Charter of Kansas City in violation of Article VI, Section 20 of the Missouri Constitution; that Proposition A thereby also violated Article III, Section 51 of the Missouri Constitution by using the initiative for a purpose prohibited by the Constitution; that Proposition A failed to disclose that it would result in the amendment and possible repeal of a provision of the City Charter of Kansas City; that Proposition A failed to disclose that it allows an amendment to the City Charter of Kansas City without requiring signatures from ten percent of the registered voters in the City and instead allowed the petitioners to obtain signatures from voters across the state in contravention of Article VI, Section 20 of the Missouri Constitution; that such failures to disclose are procedural deficiencies in violation of Mo. Const. Article III, Section 50 which requires the petition to set forth "the full text of the measure." Plaintiffs further request that the Court find and declare that defendant Carnahan's certification of Initiative Petition 2010-077 – Version 3 was in error, and that the Court order and adjudge that defendant Carnahan's certification of the Initiative Petition 2010-077 – Version 3 be reversed; that the Court declare the amendments to the earnings tax law

> under Proposition A to be null and void as unconstitutional; that the Kansas City earnings tax law in effect prior to the passage of Proposition A shall remain in effect; that the Kansas City earnings tax shall continue without the necessity of the elections specified in Proposition A; and for such other relief as the court deems just.

Appellants alleged facts entitling them to a declaration of rights because Appellants alleged that Proposition A amended the City's Charter through a statewide initiative instead of a local initiative, which is the process the by which citizens may propose a Charter amendment though the initiative process.

Respondents argued that a statewide initiative may be used to enact statutes that limit or deny a Charter City's powers pursuant to Article VI, Section 19(a) of the Missouri Constitution, which states the following:

> Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute.

The trial court's determination that people of the state, along with the General Assembly, have the authority to amend a City Charter was a decision on the merits that is procedurally inconsistent with a dismissal for failure to state a claim, and thus improper. *State of Missouri ex rel. American Eagle Waste Industries*, 272 S.W.3d at 341. The court cannot dismiss Appellants' petition for failure to state a claim by finding in favor of

Respondents on the merits. *Sandy*, 39 S.W.3d at 855. A review of the authority relied on by Respondents shows that they relied exclusively on authority which allows the General Assembly to limit a City's Charter powers by statute. None of the authority cited by Respondents involved the precise question before this Court, which is whether it is permissible to use *a statewide initiative* to amend *a home rule Charter*.

Appellants do not dispute the right of the citizens of Kansas City to amend their Charter through a local initiative, but vigorously contest the authority of state voters to do so by a statewide initiative.

There are only three ways in which a City Charter may be amended, and those procedures are set forth in Article VI, §20 of the Missouri Constitution[4]: (1) by a City

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[4] Article VI, §20 states as follows:

> Amendments of any city charter adopted under the foregoing provisions may be submitted to the electors by a commission as provided for a complete charter. Amendments may also be proposed by the legislative body of the city or by petition of not less than ten percent of the registered qualified electors of the city, filed with the body or official having charge of the city elections, setting forth the proposed amendment. The legislative body shall at once provide, by ordinance, that an amendment so proposed shall be submitted to the electors at the next election held in the city not less than sixty days after its passage, or at a special election held as provided for a charter. Any amendment approved by a majority of the

Charter commission; (2) by the City Council; or (3) by a petition signed by **not less than ten percent of the registered qualified electors of the City**. No other ways are provided. And the reason is simple. The Missouri Constitution empowers certain cities, like Kansas City, to be a **home rule** charter city. Each of the three methods of amendment provided for in Article VI, §20 protect or assure the basic concept upon which **home rule** is based; i.e., the decisions to amend the charter are to be made exclusively by the electorate of the **home rule** charter city.

Because Proposition A was characterized as proposing only changes to Chapter 92 of the Missouri statutes, and not changes to Kansas City's Charter, it required signatures of an entirely different class of people – **five percent of the total state votes** cast in the 2008 governor's election from six of the state's nine congressional districts. [5]

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qualified electors voting thereon, shall become a part of the charter at the time and under the conditions fixed in the amendment; and sections or articles may be submitted separately or in the alternative and determined as provided for a complete charter.

[5] Article III, §50 states as follows:

Initiative petitions proposing amendments to the constitution shall be signed by eight percent of the legal voters in each of two-thirds of the congressional districts in the state, and petitions proposing laws shall be signed by five percent of such voters. Every such petition shall be filed with the secretary of state not less than six months before the election and shall

Allowing voters statewide the power to amend Kansas City's Charter is a violation of Article VI, §20 and is an attack on home rule provisions that have been part of Missouri's history since 1875.

Kansas City voters passed a Charter amendment in 1963 which authorized the City to enact an earnings tax of one-half percent. In 1970, Kansas City voters approved a Charter amendment to increase the earnings tax to one percent. Kansas City voters reaffirmed their approval of the earnings tax when they adopted the current City Charter in August 2006.

Section 813(a) of the current City Charter provides that the City is authorized to "levy and collect, by ordinance" an earnings tax. Section 813(b) provides that the tax "shall not be in excess of one percent per year."

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contain an enacting clause and the full text of the measure. Petitions for constitutional amendments shall not contain more than one amended and revised article of this constitution, or one new article which shall not contain more than one subject and matters properly connected therewith, and the enacting clause thereof shall be "Be it resolved by the people of the state of Missouri that the Constitution be amended:". Petitions for laws shall contain not more than one subject which shall be expressed clearly in the title, and the enacting clause thereof shall be "Be it enacted by the people of the state of Missouri:".

Following the passage of Proposition A, the City was required to hold an election in April 2011 in order to retain the tax, and will now be required to hold subsequent elections every five years. No such requirement is contained in the current Kansas City Charter. In none of the three times Kansas City voters amended their Charter to authorize an earnings tax, did they agree to the cost of an election every five years.

Respondents may argue that there is simple solution to this problem of the costs of multiple elections. They may argue that there is no requirement for the City to let its voters decide the matter in a local election. Rather, the City could deny its citizens a vote, save the cost of the elections, and let the earnings tax phase out automatically.

The problem, of course, is that Proposition A was not initiated by Kansas City voters. If the City had failed to hold an election in April 2011, the earnings tax would have been phased out automatically, beginning in January 2012. Section 813 of the Kansas City Charter would have been amended, not by a majority of Kansas City voters, by a majority of statewide voters, without the citizens of Kansas City having the opportunity to decide for themselves in a local election whether they support the amendment.

While the citizens of Kansas City did approve continuation of the earnings tax at the April election, they did so at an election that they never agreed to pay for when they adopted the current Charter in 2006.

In 2016, the citizens of Kansas City will again be required to pay for an election in order to have the opportunity to continue this local tax. State voters have imposed this financial burden on the citizens of Kansas City, but do not share the obligation. If the

City fails to hold the election in 2016, the Charter will continue to state that the earning tax "shall not exceed one percent per year," but Proposition A would amend the Charter, beginning in January 2017, to state that the earnings tax "shall not be in excess of nine-tenths of one percent." If the City were to levy a one-percent earnings tax, in compliance with its Charter, it would be in violation of Proposition A. That inconsistency with the Charter would continue with each annual phase out of one-tenth of one percent.

Plaintiffs do not dispute that Kansas City citizens have the power, through a local initiative, to propose amendments to their Charter. But they cannot stand by and allow statewide voters to infringe upon Kansas City's home rule charter power granted them by the Missouri Constitution. Quite literally, the citizens of Kansas City were required to spend upwards of $200,000 on an April election on a local issue, simply because voters in Monett, Poplar Bluff, Jefferson City, St. Joseph, Maryville and Canton supported Proposition A. Such a result is contrary to Missouri's long history recognizing the importance of home rule.

The power and authority to amend a city charter belongs to the citizens of that city alone. *State ex rel. Childress v. Anderson*, 865 S.W.2d 384, 387 (Mo. App. S.D. 1993). Missouri was the first state in the nation to adopt a home rule provision to its Constitution in 1875, allowing certain cities the power and authority to adopt their own charters. Michael Libonati, *Home Rule: An Essay on Pluralism*, 64 WASH. L. REV. 51, 65 (1989); MO. CONST. (1875) Art. IX, § 16. Following this grant of authority, Kansas City adopted its first Charter on April 8, 1889. *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 465 (Mo. 1897).

"Home rule charter" is defined by Black's Law Dictionary (8th Edition) as "the organizational plan or framework of a municipal corporation, analogous to a constitution of a state or nation, **drawn by the municipality itself and adopted by a popular vote of its people**."

"Municipal charters are a charter city's organic law, its constitution." *State ex rel. Chastain v. City of Kansas City*, 289 S.W.3d 759, 764 (Mo. App. W.D. 2009). "A municipal charter is adopted by a vote of the citizens of a municipality." *Id.* "In granting a city the ability to adopt and amend a charter, the Missouri Constitution reflects a city's 'broad authority to tailor a form of government that its citizens believe will best serve their interests.'" *Id.* (quoting *City of Springfield v. Goff*, 918 S.W.2d 786, 789 (Mo. banc 1996). "The power created by a municipal charter derives from the citizens of the municipality." *State ex rel. Childress v. Anderson*, 865 S.W.2d 384, 387 (Mo. App. S.D. 1993). The citizens, alone, delegate their power to representative instruments such as the municipal charter. *Id.*

The Missouri Constitutional provision authorizing a charter amendment and the acceptance of the amendment by the requisite number of voters is derived directly from the Constitution, is self-enforcing, and is "not subject to change or modification, either by charter enactment of the city *or by act of the General Assembly*." *State ex Inf. Taylor, Attorney General, ex rel. Kansas City v. North Kansas City*, 360 Mo. 374, 392 (Mo. 1950) (quoting *Major, Attorney General v. Kansas City*, 233 Mo. 162 (Mo. 1911).

Article VI, §20 amounts to a "direct constitutional grant of power" from the people of the state authorizing constitutional charter cities, through their electors, to

amend their charters. *McConnell v. City of Kansas City*, 282 S.W.2d 518, 520 (Mo. 1955).

In adopting Article VI, §20 of the Missouri Constitution, "the people of the state granted certain cities the right and privilege of adopting and living under a home rule charter, and the constitutionally unlimited right and privilege of amending such charter in the manner therein provided...." *State ex Inf. Taylor, Attorney General, ex rel. Kansas City v. North Kansas City*, 360 Mo. 374, 392 (Mo. 1950). "The citizenship of the state plainly intended to give such cities the right to determine for themselves the kind of charter under which they should live." *State ex Inf. Taylor, Attorney General, ex rel. Kansas City v. North Kansas City*, 360 Mo. 374, 392 (Mo. 1950).

In *McConnell*, the court determined that a state law which limited a charter city's right to amend its charter pursuant to article VI, §20 was invalid as to charter cities. *McConnell*, 282 S.W.2d at 522. (holding that a law which postpones the submission to the electors of a City a charter amendment proposing an annexation until a declaratory judgment action is filed and finally determined conflicts with the procedure set forth in article VI, §20, for amending a City Charter and is therefore invalid as to charter cities). "[A]n attempt by the legislature to require a declaratory judgment by a court, 'authorizing' a charter city to annex specific territory...amounts to the delegation of a power to the court which by the constitution has been conferred upon the city and its electors." *Id.* at 520-21.

The reasoning in *McConnell* was later called in question with respect to annexation, because the court determined that its holding "necessarily assumes that an

annexation of adjoining land by a charter city is a charter amendment." *State ex inf. Hannah v. City of St. Charles*, 676 S.W.2d 508, 512 (Mo. 1984). The *Hannah* court noted that *McConnell* was decided prior to the adoption of article VI, §19(a) of the Missouri Constitution. With the adoption of §19(a), a charter amendment was no longer needed for a charter city to annex property, because "even in the absence of a charter provision, the power to annex is vested in the municipality by virtue of the direct grant of power in §19(a)." *Id.* at 512. Accordingly, the court determined that there was no longer a conflict between article VI, §20 and the law found invalid in *McConnell*.

While a charter amendment is no longer needed for a charter city to annex property, Proposition A does conflict with the process set forth in article VI, §20, in that it allows state voters to amend the City Charter of Kansas City. Rather than requiring the City to jump through additional hoops to amend its charter, it takes things even further by allowing state voters the power to rewrite Kansas City's Charter. In that sense, it amounts to a delegation of power to state voters which the constitution conferred upon Kansas City and its voters. Article VI, §20 provides three ways in which Kansas City and its voters may amend its charter. Proposition A violates that provision by extending that right to state voters.

Respondents argue that Proposition A involves an exercise of power granted under Article VI, Section 19(a), to limit or deny powers to charter cities by statute. The constitutional provision relied upon by Respondents does not address the initiative process. Additionally, none of the cases cited by Intervenors involve the precise question

before this court, which is whether it is permissible to use *a statewide initiative* to amend *a home rule Charter*.

The Missouri Constitution contains two separate procedures for using the initiative process – one for state issues and one for amendments to home rule Charters. Proposition A allowed voters statewide to decide whether Kansas City's Charter should be amended. Appellants are entitled to declaration of rights on this important issue concerning home rule authority. The trial court prematurely ruled on the merits of Appellants claim, relying exclusively on authority that did not address the precise question before the court. The case should be remanded for proceedings on the merits.

CONCLUSION

This Court should reverse the trial court's Order and Judgment of August 15, 2011 and remand this cause to the Circuit Court of Cole County to give the Appellants an opportunity to present evidence on their claims for the reason that the Second Amended Petition stated claims for declaratory judgment in each of the three counts that were pleaded, and the trial court, in ruling on the merits of the claims, did not follow the proper standard of review for a motion to dismiss for failure to state a claim.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND OF SERVICE

Sarah Baxter, attorney for Appellants, hereby certifies that she is in compliance with Rule 55.03, that this brief is in compliance with the limitations contained in rule 84.06(b), that Appellant's brief contains 18,311 words, that the brief was prepared using Microsoft Word 13 point Times New Roman font. I hereby certify that I electronically filed Appellant's Brief through the Missouri eFiling System this 19h day of January 2012, and that notification of such filing will be sent to the following eFiling participants of record in this case:

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